



Guidance

Disclosure prohibited by other legislation exemption (section 37)

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USING THE EXEMPTION GUIDANCES

This is one of a series of Guidances by the Information Commissioner's Office that offers an overview of the Information Commissioner's understanding of the exemptions in the Public Access to Information (PATI) Act. The Guidances are a reference tool to help decision makers—Information Officers, heads of public authorities, and those assisting them—understand when and how to apply the exemptions.

The Guidances provide our general recommended approach and the issues the Information Commissioner will likely consider when deciding an application for review. The Guidances do not replace the need to obtain training on the PATI process and the operation of the exemptions. It may also be necessary for public authorities to obtain legal advice on the interpretation and application of the exemptions.

Each Guidance discusses a specific exemption provision. It provides background and the applicable tests for each exemption, along with examples of questions designed to assist your decision making. The questions may help you identify the issues to consider when applying an exemption in the context of a specific request. It is essential that decision makers are able to explain the factual and reasoned basis for relying on an exemption. The Guidances are designed to support this good practice.

The exemptions limit the new right to access public records and, because of this, should be understood narrowly. This is consistent with the PATI Act's purpose to provide the greatest access as possible to public records.

It is recommended that Guidances are read together when more than one exemption could apply to a record. Decision makers should also refer to our *Guidance: the public interest test* as a companion when applying exemptions that require you to weigh the public interest.

Currently, the use of the exemptions under the PATI Act, a new statutory regime, has not been tested and settled under Bermuda law.

For this reason, these first ICO Guidances are based upon the language and purposes of the PATI Act and Regulations, as well as any related local law. The Guidances are also informed by the guidelines, decisions, and legal judgments from the UK and other appropriate Commonwealth countries with comparable exemption provisions. References to other jurisdictions are provided for illustration purposes and to give examples of how those exemptions have been interpreted.

The Guidances are subject to a planned review and may undergo ad hoc revisions to incorporate new Information Commissioner decisions, court judgments, or legislative changes.

Information Commissioner
September 2016

In brief: the exemption for disclosure prohibited by other legislation

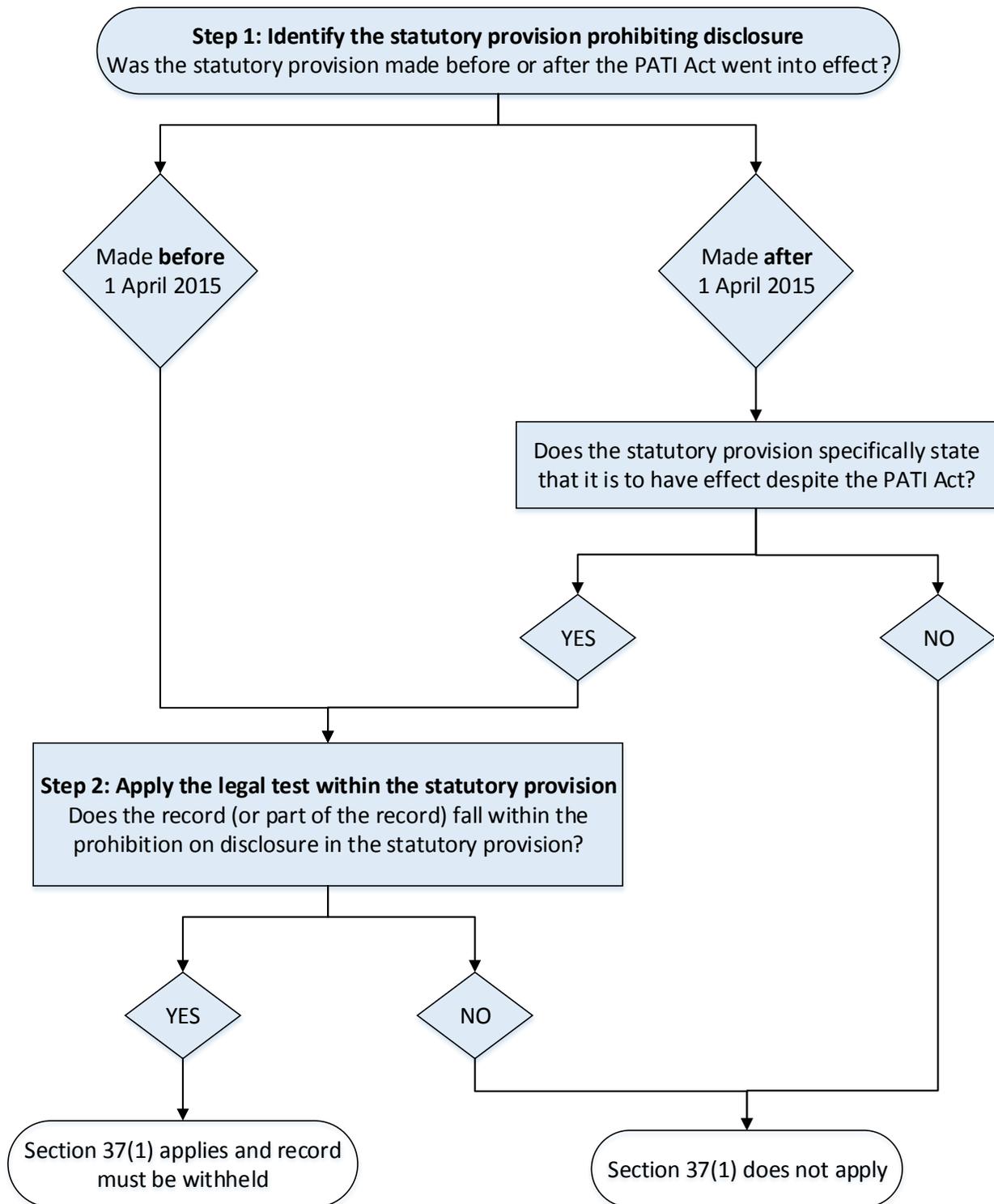
1. Section 37(1) of the PATI Act exempts information from the right of access when disclosure is prohibited by a statutory provision other than the PATI Act. This might include, for example, a provision in a public authority's governing legislation.
2. The exemption in section 37(1) does not have a harm test. If you decide that disclosure of the requested record is prohibited by another statutory provision, as set out below, then you may withhold the record under section 37(1).
3. This is also an 'absolute' exemption. This means that you do not need to consider the public interest test when making a decision under section 37. If the requested record falls within the exemption, no further analysis is needed to withhold the record under the section 37(1) exemption.
4. The PATI Act is retrospective. It applies to records created at any time.
5. Unlike most of the other exemptions that will not apply to a record that is over 30 years old, the exemption in section 37(1) will apply to a record regardless of how old it is, so long as the statutory provision which prohibits its disclosure remains in place. Thus, the applicability of the section 37(1) exemption will not lessen over time or expire under section 40 of the PATI Act.
6. Section 37(6) contains an explicit prohibition from disclosure of records held by the Attorney General or Director of Public Prosecutions that are subject of legal professional privilege. This provision is specific to the two named public authorities and should not, under normal circumstances, affect most other authorities. The general exemption for legal professional privilege is also addressed in a separate Guidance (see Appendix 1). For that reason, we have not given it detailed attention in this Guidance.

Steps to follow when applying the exemption for disclosure prohibited by other legislation

7. The decision-making process to apply an exemption should always start with a presumption of disclosure. You should assess the records on a case-by-case basis.
8. The considerations required for the application of the exemption in section 37(1) are set out below. As you make a decision, pay careful attention that you follow any test or criteria set out in the statutory provision that prohibits disclosure of the information being requested.

9. In most cases, your public authority will first locate and retrieve the requested records.
10. You may then decide that a statute or statutory instrument prohibits disclosure. Consider taking the following actions:
 - i. Identify the statutory provision which prohibits disclosure and check the date the statutory provision was made;
 - ii. If the statutory provision was made *before* the PATI Act came into effect on 1st April 2015, you need to apply the legal tests found within that statutory provision to decide if disclosure can be made.
 - a. If the record (or part of the record) DOES fall within the prohibition on disclosure in the statutory provision, section 37(1) applies and you must withhold the record (or part of the record).
 - b. If the record (or part of the record) DOES NOT fall within the prohibition on disclosure in the statutory provision, the record (or part of the record) cannot be withheld under section 37(1).
 - iii. If the statutory provision was made *after* the PATI Act came into effect on 1st April 2015, you should look for express mention of the PATI Act within that statutory provision:
 - a. If the statutory provision DOES expressly state that its prohibition on disclosure is to have effect despite the PATI Act, you need to apply the legal tests found within that statutory provision to decide if disclosure can be made.
 - i. If the record (or part of the record) DOES fall with the prohibition on disclosure in that statutory provision, section 37(1) applies and you must withhold the record (or part of the record).
 - ii. If the record (or part of the record) DOES NOT fall within the prohibition on disclosure in that statutory provision, the record (or part of the record) cannot be withheld under section 37(1).
 - b. If the statutory provision DOES NOT expressly state that its prohibition on disclosure is to have effect despite the PATI Act, then you cannot use it to justify withholding a record under section 37(1).
11. Once you have reached your decision, a Decision Notice should be issued to the requester that explains your decision and your reasoning.

Steps in applying section 37 exemption



Disclosure prohibited by other legislation – section 37(1)

12. Section 37(1) exempts information from the right of access if its disclosure is prohibited by any statutory provision, other than the PATI Act.
13. Some public authorities hold records which are subject to prohibitions on disclosure under statutory provisions other than the PATI Act.

Example:

The Consumer Protection Act 1999 prohibits the disclosure of records containing information obtained through exercising the statutory functions of the Board. Those statutory functions are defined in section 4 of the Consumer Protection Act. Section 8 of that Act sets out the prohibition on disclosure:

Board and staff to maintain secrecy

8 The members of the [Consumer Affairs] Board, the Executive Officer and every person acting under the direction of the Board, shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions, and shall not communicate any such matter to any person except for the purpose of carrying out their functions under this Act.

14. When you receive a request for records that you think may be prohibited from disclosure by a statutory provision, you will have to assess whether the information falls within the scope of that prohibition.
15. The prohibiting statutory provision may set out conditions, tests or time limits which must be met before the prohibition applies. Some statutory provisions prohibiting disclosure may also require consideration of public interest factors as part of that statutory test.
16. We cannot provide a list of statutory provisions that prohibit disclosure. If in doubt, you should seek advice about this within your authority. Public authorities will usually know from their prior work and experience which other statutory provisions govern their work, including those that prohibit disclosure of certain records or information.

17. If you apply the section 37(1) exemption to withhold a record, you should clearly state in your Decision Notice the relevant statutory provision and explain why the record (or part of the record) fits within that prohibition.

Statutory provision

18. A 'statutory provision' is defined in section 2 of the Interpretation Act 1951 as: a provision of any 'Act' or any 'statutory instrument'.

19. An Act is an Act of the Legislature of Bermuda.

20. A statutory instrument is also defined in the Interpretation Act as any proclamation, rule, regulations, order, rule of court, bye-law, notice or other instrument made under or by virtue of any provision of law and having legislative effect.

21. Taken together, statutory provisions do not include prohibitions on disclosure that arise from judicial cases or those created under a contract. These may be covered by other exemptions under the PATI Act, such as the exemption in section 26 for information received in confidence.

Prohibited

22. The section 37(1) exemption only applies when an Act or statutory instrument actually prohibits disclosure.

23. If the statutory provision gives you the power to decide whether or not to withhold information, this creates a discretionary decision about disclosure. It is not a prohibition against disclosure. The section 37(1) exemption would not apply.

24. This discretion is usually indicated by the word 'may' in the statutory provision, which indicates the discretion to be applied by the decision maker.

25. If, though, the statutory provision gives you an 'absolute duty' to prevent disclosure of the requested record, then the section 37(1) exemption will apply.

26. An absolute duty is usually indicated by the word 'shall' in the statutory provision, which indicates that the obligation is mandatory and must be carried out. It may also be accompanied by a provision setting out penalties for unauthorised disclosures.

27. Sometimes the statutory prohibition may refer to records related to certain functions of a public authority as defined in the relevant statutory provision. For example, section 8 of the Consumer Protection Act, quoted above, refers to the 'functions' of the Consumer Affairs Board. Those statutory functions are listed in section 4 of the Consumer Protection Act.

28. You should carefully examine how the statutory provision is worded to ensure it applies to the records you are considering.

Questions to consider when applying the exemption for disclosure prohibited by other legislation

29. When deciding if the exemption for disclosure prohibited by other legislation applies to a requested record (or part of a record), you may also want to consider the following examples of the type of questions that the Information Commissioner may consider during a review.

Note:

These examples of questions presented here may help you think through what to ask yourself as you decide if an exemption is appropriate.

Not all of the questions will apply in every case and they are not an exhaustive list of every issue that might arise. You will need to decide what issues are relevant to the specific request you have.

Can you identify a specific provision within an Act or statutory instrument which prohibits disclosure of the information requested?

- Can you indicate the specific provision that contains the prohibition?
- Are there other statutory provisions that help define or identify which records or information cannot be disclosed, such as a provision that defines the public authority's 'functions'? Are there statutory provisions that impose penalties or sanctions for unauthorised disclosure?

When was the statutory provision made? If the provision was made after 1 April 2015, does it expressly state that it has effect over the PATI Act?

- Can you indicate the date the statutory provision was made?
- Can you show an express reference to having effect over the PATI Act, if required?

What is the nature of the prohibition?

- Is disclosure subject to the decision maker's discretion? Or is the prohibition a duty or obligation that must be followed?
- What are you basing this understanding on? Can you indicate the relevant statutory language?
- Do you need to refer to the functions of your public authority? If these are defined in legislation, this definition must be followed.
- Are there any penalties or sanctions for unauthorised disclosure that support your understanding that the prohibition is mandatory and not discretionary?

Can you show that the tests, considerations, etc., are met for the statutory provision prohibiting disclosure?

- Can you carefully identify what records or information fall within the prohibition?
- Can you explain, factually, how the specific requested record falls within that definition?
- Are you sure that all of the responsive records will fall within the statutory provision on disclosure or are only some of the responsive records included? Are there some records that may be disclosed?

30. You do not need to consider any harm test and you do not need to conduct the public interest test.

31. If you decide that disclosure of the requested record (or part of a record) is not prohibited by a statutory provision other than the PATI Act, the section 37(1) exemption is unavailable.

32. If you decide, instead, that disclosure of the requested record (or part of the record) is prohibited, then the section 37(1) exemption is available and the record must be withheld.

More information

33. Appendix 1 lists select resources and cases from other jurisdictions. They are provided for illustration and are not intended to be a statement of law in Bermuda, or to replicate independent legal advice.

34. Appendix 2 cites the exemption as it appears in the Public Access to Information (PATI) Act 2010 at the time of this Guidance’s publication. A complete and up-to-date version of the PATI Act is available at www.bermudalaws.bm.
35. If you need any more information about this Guidance or have an inquiry about any other aspect of the PATI Act, or public access to information generally, please contact us:



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APPENDICES

Other related ICO Exemption Guidances

Personal information (sections 23 and 24)

Information received in confidence (section 26)

Law enforcement (section 34)

These, and other, Information Commissioner’s Guidances are available on our website, www.ico.bm, as they are published. Hardcopies are available from our office, Valerie T. Scott Building, 60 Reid Street, Hamilton HM 12.

Illustrative decisions from other jurisdictions

Decisions by Information Commissioners, Information Rights Tribunals, and the Courts of other Commonwealth jurisdictions are not binding in Bermuda (although some may be viewed as persuasive). There are also differences between the PATI Act and the freedom of information laws in other countries. As a result, the decisions summarised below are not directly applicable here, but provide an illustration of how public access to information laws—and exemptions in particular—operate.

Reference	Parties	Citation	Summary
Disclosure prohibited by other legislation	<i>David Barrett v The Information Commissioner and the Office for National Statistics</i>	EA/2007/0112 (UK Information Tribunal) (23 April 2008)	The applicant sought from the Office for National Statistics records from the 1921 census about his great aunt and uncle. Section 8(2) of the Census Act 1920 stated that if anyone under the control of the Registrar-General ‘discloses any personal census information to another person, without lawful authority, he shall be guilty of an offence.’ The Information Tribunal agreed with the Information Commissioner that the Office for National Statistics was under the control of the Registrar-General and that no circumstances arose which provided lawful authority for disclosure. The information was correctly withheld under the exemption for disclosure prohibited by other legislation.
	<i>Department for Work and Pensions</i>	Decision Notice FS50572129 (UK Information)	The Applicant sought records of peer reviews conducted by the Department for Work and Pensions (DWP) concerning the death of individuals DWP

		<p>Commissioner) (17 September 2015)</p>	<p>viewed as vulnerable claimants.</p> <p>DWP withheld the records under the exemption for disclosure prohibited by other legislation because a provision of the Social Security Administration Act (SSAA) 1992 made it an offence for employees of the Social Security Administration to disclose any information acquired in the course of employment and which relates to a particular person. The SSAA permitted disclosure if the information was previously disclosed to the public pursuant to lawful authority or could be disclosed in summary form and prevent disclosure of information that could be related to a particular person.</p> <p>The Information Commissioner determined that the records were properly withheld because:</p> <ul style="list-style-type: none"> • The statutory prohibition applies to the records in the reviews that were created during the reviews and that were collected for the reviews; • The circumstances did not meet any of the conditions for removing the prohibition on disclosure in the SSAA. <p>The Information Commissioner could not find any sensible way that a summary could be provided that would not provide information that related to the deceased beneficiaries.</p>
	<p><i>Stafford County Council</i></p>	<p>Decision Notice FS50517099 (17 March 2014)(UK Information Commissioner)</p>	<p>The Applicant sought a list of internal audit reports and the Council asserted that they were exempt under Part 1 of Schedule 12A of the Local Government Act 1972.</p> <ul style="list-style-type: none"> • The Information Commissioner found that the exemption was not applicable. The Local Government Act requires councils to make certain information publicly available proactively, including minutes and reports from council meetings. Part 1 of Schedule 12A lists items that do not fall within this publication requirement. If a report is considered at a meeting but is the type of record listed in Part 1 of Schedule 12A, it does not need to be proactively published. • With this reasoning, the Information Commissioner found that the exemption from a duty to publish is not the same as a prohibition on disclosure. If the same documents are requested under the

			information access law, the Local Government Act does not prohibit disclosure.
Incidental powers of a public authority	<i>The Corporation of Hamilton v Attorney General and The Centre for Justice</i>	[2014] SC (Bda) 84 Civ (5 November 2014)	This case was not decided under the PATI Act, but is relevant because the Bermuda Supreme Court considered the approach when determining if general and/or incidental powers are implied into an express statutory function.

Disclosure prohibited by other legislation – section 37

37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.

* * *

(5) Where a statutory provision made after the coming into operation of this section prohibits the disclosure of a record, the provision shall not have effect unless it provides specifically that it is to have effect notwithstanding this Act.

(6) For the avoidance of doubt a record held by the Attorney General or the Director of Public Prosecutions, that is the subject of legal professional privilege, shall be an exempt record and shall not be subject to public disclosure of any kind.

